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No. 83-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM HARRIS SHARPE and DONALD DAVIS SAVAGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE OF THE JUDGMENTS BELOW

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QUESTIONS PRESENTED

I.

Whether the Fourth Circuit was correct in holding that the length of the detentions of Sharpe and Savage effectively transformed them into *de facto* arrests, without basis or probable cause, making the detentions unreasonable seizures under the Fourth Amendment?

II.

Whether the Fourth Circuit correctly held that evidence seized as a result of the unlawful detention properly was suppressed as to Sharpe?

III.

Whether this Court should consider the case, since Sharpe and Savage are fugitives and reversal of the Court of Appeals would not end the litigation?

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This Brief supports oral argument to be presented during this term.

STATEMENT OF THE CASE

Following a bench trial in the United States District Court for the District of South Carolina, Sharpe and Savage were convicted of possession of marijuana

with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). In a 2-1 decision, the Court of Appeals reversed their convictions.

1. The evidence showed that on June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina. This area had been under surveillance by law enforcement authorities for suspected drug trafficking. (Tr. 35-36, J.A. 10) At approximately 6:30 A.M., Cooke observed a blue pick-up truck with an attached camper shell traveling in tandem with a blue Pontiac. Observing that the truck was riding low in the rear and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. (J.A. 11) After approximately 20 miles, Cooke determined that he would stop the vehicles. He dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded. (J.A. 14)

Some time after Thrasher joined the procession, the Pontiac and the truck turned into a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicles signaled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. The officers testified that the truck and Pontiac were traveling between 55 and 60 miles per hour, although the posted speed through the campground was 35 miles per hour. (J.A. 16, 35) At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck one half mile down the road. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe. The license was in the name of Raymond J. Pavlovich. (J.A. 17-18) Sharpe and his passenger (against whom the charges were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance. Two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. (J.A. 18, 27-28) Asking the local police to "maintain the situation", Cooke turned over custody of Sharpe and the passenger to them. Cooke left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn. He had ordered the driver to get out of the truck and to assume a "spread-eagled" position against its side. Thrasher searched him. At Thrasher's request, the driver produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop, but indicated that he would hold him there until Cooke arrived. Savage then requested the return of his license and permission to leave. Thrasher refused to return the license, and pocketed it. He told Savage that he was not free to leave as he was under custodial arrest, and that he could detain Savage on speeding charges if necessary. (J.A. 37-39, 42-43) The traffic "charges" were merely a pretext to hold Savage until the arrival of Cooke. (Tr. 166, 172; J.A. 43)

When Cooke arrived appoximately 15 minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper. Savage refused permission both times. (J.A. 30) Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it. He found a number of highly compressed, well wrapped burlap bales, but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac. There, he placed Sharpe under arrest. By the time Sharpe was arrested, approximately 30 to 40 minutes had elapsed since Cooke had stopped the Pontiac. (J.A. 33)

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach Police Station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained 43 intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales and stored them in a vault in his office. The rest were destroyed by fire, under the direction of the Assistant United States Attorney and without

permission of the District Court. (Tr. 221-222, 151-154)

2. On appeal, a panel of the Fourth Circuit Court of Appeals reversed Respondents' conviction in a 2-1 decision. (Pet. App. B, 14a-51a) The Circuit Court interpreted this Court's cases concerning investigatory field stops of vehicles to require a reasonable suspicion by the officer of illegality, supported by articulable and objective facts, and that the stop must be brief. (Pet. App. B, at 18a-19a) The Court assumed "without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking" when the officers stopped the vehicles that Respondents were driving. *Id.* at 19a.

However, the Court concluded that the stops failed to meet the requirement of brevity. (*Id.*) The Court noted that it was the transitory nature of the stop that justified the elimination of the probable cause requirement for investigatory stops. It recognized that when this Court transposed the stop and frisk rationale of *Terry* v. *Ohio,* 392 U.S. 1 (1968), to the vehicle stop situation, this Court "was careful to emphasize the *de minimus* nature of such stops in justifying the intrusion under the Fourth Amendment". (Pet. App. B, at 19a) Thus, the Court found that Sharpe was detained without probable cause for arrest for 30 to 40 minutes before Cooke returned to the Pontiac to arrest him. Likewise, Savage was held under custodial arrest without probable cause by Thrasher for at least 15 minutes, while being questioned, and before formally arrested by Cooke. "Indeed, the length of the detentions effectively trans-

formed them into *de facto* arrests without basis and probable cause," thereby converting the stops into unreasonable seizures under the Fourth Amendment. (Pet. App. B, at 20a)

Then, obtaining guidance from *Dunaway* v. *New York*, 442 U.S. 201 (1979), the Appeals Court found that the detentions of Sharpe and Savage were like the detention in *Dunaway*. It found the lengthy detentions of Respondents by law enforcement officers, who had no intention of allowing Respondents to leave custody, closely resembled traditional arrests. Therefore, since probable cause did not exist prior to the detentions (nor until the truck was opened and the bales discovered), the Court viewed the detentions as illegal seizures under the Fourth and Fourteenth Amendments. (Pet. App. B, at 20a-21a)

Having determined that Sharpe and Savage were illegally detained, the Court inquired into whether the bales of marijuana that Cooke discovered during the search of the truck should have been suppressed as fruits of the illegality under *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The Court inquired, pursuant to a proper *Wong Sun* "fruits" analysis, "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged as the primary taint" (citing *Wong Sun* at 488). The Court then held that the officer would not have had the opportunity to smell the raw marijuana, and thus, would have had no reason to search the truck, had Savage not been detained for

longer than constitutionally permissible under an investigatory stop. (Pet. App. B, at 22a)

The Court also rejected Petitioner's argument that Cooke's olfactory find supplied the probable cause, holding that his smelling of the marijuana was so intertwined with the circumstances of the unlawful detentions, that it could not have purged the illegal taint of those detentions, and therefore, could not have served as probable cause for a search. (*Id.*)

As an alternative ground for mandating suppression of the fruits of the unlawful detention, the Court of Appeals held that the officers' warrantless search of the burlap wrapped marijuana bales discovered in the pick-up truck violated the Fourth Amendment. (Pet. App. B, 23a-25a) The Court concluded that under the analysis in *Robbins* v. *California*, 453 U.S. 420 (1981), the warrantless search of the bales was impermissible.

Because of the resolution of the issues on appeal, the Court did not address the questions of (1) whether the District Court properly refused to suppress Sharpe's license and the bill of sale for the truck; (2) whether or not Agent Cooke had a reasonable and articulable suspicion to stop the vehicles; and (3) whether the marijuana was subject to suppression on the alternative ground that Respondents suffered prejudice from the destruction of the marijuana without notice to them. (Pet. App. B, at 22a and 25a)

Circuit Judge Russell dissented, stating that a balancing test was necessary in order to examine the reasonableness of the search and seizure. He also

would have found that the intrusion in this case was minimal and that the delay was occasioned by the Respondents themselves. (Pet. App. B, 26a-51a)

3. After rehearing *en banc* was denied by an equally divided court (See no. 81-1736, Pet. App. 39a-40a), the United States petitioned for certiorari in this Court. The questions presented were: (1) Whether law enforcement officers may detain an individual suspected of criminal activity for a limited but more than momentary period in order to pursue the investigation; (2) Whether the marijuana seized from the vehicle was suppressible as a fruit of the detention; and (3) Whether the Constitution required a warrant prior to the searching of the burlap bales in the back of the truck. This Court granted certiorari on June 21, 1982, vacated the judgment of the Fourth Circuit, and remanded the case to the Fourth Circuit for further consideration in light of *United States* v. *Ross,* 456 U.S. 798 (1982). *United States* v. *Sharpe,* 457 U.S. 1127 (1982). Justice Stevens, joined by Justices Brennan and Marshall, dissented because *United States* v. *Ross* shed no light on the proper disposition of whether the warrantless search itself was legitimate. 457 U.S. at 1128.

On remand, the Court of Appeals again reversed the convictions 2-1. (Pet. App. A, 1a-13a) The majority concluded that by virtue of *Ross,* the alternative basis for the previous decision was no longer valid. (Pet. App. A, at 2a) However, the majority found that *Ross* did not adversely affect the primary holding, that the initial stop of the vehicles and the lengthy detention of the Respondents constituted illegal seizures. The majority therefore, readopted the

original majority opinion as modified, and again reversed the convictions. (*Id.* at 2a-3a)

Judge Russell again dissented, concluding that this Court's remand required consideration of both alternative grounds of decision. He argued that the decision of the majority was inconsistent with *Michigan* v. *Summers,* 452 U.S. 692 (1981), and failed to take into account Respondents' responsibility for the length of the detention. (Pet. App. A, 8a-9a)

Prior to the entry of the Court of Appeals' judgment on remand, the opinions were circulated to the full court. Suggestion for *sua sponte en banc* reconsideration was made by a member of the Court but failed to garner the necessary majority vote. However, the opinions on remand reflect a full court vote of 5-4 to affirm the panel opinion. (Pet. App. A, 3a, 4a, 13a)

The judgments of the Court of Appeals (Pet. App. C, 52a and 53a) on remand from this Court were entered on June 30, 1983. On August 22, 1983, Justice Brennan extended the time in which the United States could file a petition for a writ of certiorari up to and including September 28, 1983. Respondents were served with a copy of the petition on October 10, 1983. On November 9, 1983, Respondents filed a letter brief in opposition to the petition with the Clerk of this Court. On November 21, 1983, Respondents were directed to file a formal response by December 21, 1983. On December 21, 1983, Respondents filed their brief in opposition to the petition for a writ of certiorari.

The petition was granted on June 18, 1984. The brief on the merits of the United States was filed on August 2, 1984. On August 27, 1984, counsel for Respondents notified the Court that Respondents were fugitives, as of an Order of the District Court of July 11, 1984. Counsel sought permission to proceed *in forma pauperis*. On August 30, 1984, Respondents' counsel sought an extension of time to file Respondents' brief, due to the pendency of the *in forma pauperis* motion. The extension of time was granted September 5, 1984, permitting counsel up to and including October 1, 1984, within which to file a brief pursuant to Supreme Court Rule 39. On October 1, 1984, this Court denied the motion to proceed *in forma pauperis* and directed that counsel serve as amicus curiae to the decision below.

SUMMARY OF ARGUMENT

The Fourth Circuit's opinion should be affirmed. The Court did not hold that, absent probable cause, investigatory stops which are more than momentary are *pre se* unreasonable under the Fourth Amendment. Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests which require probable cause. The Court below carefully considered the facts of the case and correctly applied the facts to the current Supreme Court law.

This Court recently and forthrightly has spoken on the issue of investigatory stops. When probable cause is lacking, the police may not seek to verify their suspicions by means that approach the condi-

tions of arrest. The investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Further, the methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. Although this Court has recognized the reasonableness of seizures longer than momentary ones, the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on only reasonable suspicion. Analysis of this Court's precedents limiting investigatory stops to brief limited inquiries, and comparison of those authorities with the lengthy detentions in this case, mandates the conclusion that the officers here overstepped the lawful bounds of limited investigatory stops.

Moreover, the court below correctly applied the exclusionary rule to both Respondents. The evidence obtained following the unlawful lengthy detentions flowed causally from the Fourth Amendment violations.

Finally, the Court of Appeals merely assumed, without deciding, that the officers had a reasonable and articulable suspicion justifying the initial stop of respondents. In addition, the Court of Appeals did not consider whether the trial court erred in denying Respondents' motion to dismiss the indictment due to the destruction of the marijuana in the absence of notification to defense counsel and in the absence of a court order. Thus, reversal of the Court of Appeals will not result in the reinstatement of

Respondents' convictions, but merely a remand for determination of the unreached questions. These remaining questions make it unnecessary for the Court to address the broad constitutional questions here.

ARGUMENT

I. The Court of Appeals Was Correct in Concluding That Duration of the Detentions Effectively Transformed Them Into *De Facto* Arrests Without Basis in Probable Cause, Thereby Making Them Unreasonable Seizures Under the Fourth Amendment.

A. The issue presented here is whether the investigatory stop made pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968), was converted into an unlawful arrest by its duration and the subsequent actions of the officers.

The Constitution does not forbid all searches and seizures. Only those that are unreasonable are not permitted. *Rios* v. *United States*, 364 U.S. 253 (1960). *Terry* held that "whenever a police officer accosts an individual, and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, *supra*, 392 U.S. at 16. Not all *Terry* seizures are unreasonable, but may become so based on the duration of the detention.

The length of the detentions of the Respondents transformed them into *de facto* arrests without basis in probable cause. An essential element of a *Terry*-type stop is its brevity. It was described in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975) as "a brief stop"; in *Adams* v. *Williams*, 407 U.S. 143, 146 (1972) as "a brief stop of a suspicious individual . . . to maintain the status quo momen-

tarily . . ."; and "confined strictly to what was minimally necessary." *Terry* v. *Ohio, supra,* at 30.

A composite picture of a *Terry* stop is that it is brief, limited to the time that is minimally necessary to investigate the circumstances invoking suspicion; limited in scope to identification (such as the licensing status of a driver or registration of a vehicle); allowing perhaps a protective "pat down" of the outer surface of the suspect's clothing for weapons if the officer has reasonable apprehension that the person is armed or dangerous, and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop. See *United States* v. *Brignoni-Ponce, supra; Terry* v. *Ohio, supra; Warden* v. *Hayden,* 387 U.S. 294, 310 (1967).

In *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), this Court held that the Fourth Amendment was violated when a roving Border Patrol stopped a vehicle near the Mexican border to question the occupants about their citizenship and immigration status, merely because the occupants appeared to be of Mexican descent. The Court stated:

> The stop and inquiry must be reasonably related in scope to the justification for their initiation, and thus the officer may question a driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, *but any further detention or search must be based on consent or probable cause . . .*

Id. at 881-82. (Emphasis supplied)

Thus, after a "brief stop", and absent additional corroborative evidence of alleged criminality, the authorized "momentary detention" is transformed into "unauthorized" detention by reason of the intolerable intensity of the investigative seizure. This transformation point can be determined only by viewing the totality of the surrounding circumstances in each individual case. See *Terry, supra* at 21.

In the instant case, the Pontiac was stopped by Agent Cooke. Cooke requested and received driver's licenses from both Sharpe and his passenger. Sharpe handed him a Georgia driver's license in the name of Raymond J. Pavlovich. Although the driver and the passenger were detained, Cooke did not state why he had stopped them and did not ask them to explain their conduct. (Tr. 91) Cooke finally instructed Sharpe and the passenger to get out of the car. (J.A. 18) Cooke contacted Thrasher on his car radio and was advised that Thrasher had stopped the camper one-half mile ahead. Cooke then contacted the North Myrtle Beach Police Department. At about 7:20 A.M. a unit arrived at the Cooke/Thrasher location. Cooke left Sharpe and the passenger in the custody of the armed uniformed policemen, while he proceeded ahead to the camper. (J.A. 18-19) Eventually, Cooke returned to the Pontiac and advised Sharpe and the passenger that they were under arrest for conspiracy to possess and distribute marijuana. Thirty-five to forty minutes had elapsed since the stop of the Pontiac when Cooke advised the two men that they were under arrest. (J.A. 21)

While every arrest includes a detention, not every detention includes an arrest. See *Terry, Adams* and

Brignoni-Ponce. However, where the detention exceeded 35 minutes, it is mere sophistory to say that the stop was "brief" or constituted only a "momentary detention". Nor, did the detention of Sharpe involve only a minimum intrusion. *Terry* authorizes only an "intrusion short of arrest" recognizing even there that that is "a serious intrusion upon the sanctity of the person . . . and is not to be undertaken lightly". *Terry* v. *Ohio, supra,* 392 U.S. at 17.

Cooke admitted that the stop was based on the appearance of the pick-up truck and was a "profile" stop. (J.A. 33) Officer Thrasher testified that he knew in his mind that the truck they were following contained marijuana. (Tr. 161) However, once the stop was made, Sharpe was not questioned about these suspicions, but yet was not free to go on his way. He was placed in a police car, his license had been seized, and he was detained by armed officers for approximately forty minutes. ———

As to Savage, the situation is similar. Thrasher stopped the truck about half a mile down the road from the Pontiac. Thrasher got out of his car with his revolver drawn. Savage was ordered out of the truck, and was told to put his hands up. (J.A. 41-42) Thrasher requested a driver's license and vehicle registration or papers for the camper. He produced a Florida driver's license in his name and a bill of sale for the vehicle in the name of Pavlovich. Thrasher advised Savage that Cooke, a DEA agent, had stopped the Pontiac and would be joining them in a few minutes, and that he was going to hold Savage until Cooke got there. Savage then asked Thrasher to return his driver's license and for per-

mission to leave (J.A. 43), to which Thrasher replied that he had traffic charges he could hold him on if he had to. (*Id.*)

When Cooke finally arrived at the truck, Thrasher handed him Savage's driver's license and the Pavlovich bill of sale. This bill of sale was meaningless but for the stop of the Pontiac. Cooke then asked Savage if he could look inside the truck to which Savage replied "no". Cooke asked Savage a number of questions about the truck ownership and where he was going. Cooke then jumped on the bumper of the truck. He again asked if he could look inside the truck and Savage responded "no". Cooke then smelled around the windows of the camper. He then took the keys from the ignition and opened the back gate of the camper.

The United States concedes that probable cause to arrest the Respondents for drug offenses did not arise prior to Cooke's discovery of the marijuana. (Brief of the United States, at 15) Nonetheless, it is clear that prior to that time, Savage had been placed under *de facto* arrest. Thrasher asked him to get out of the car at gunpoint. He "spread eagled" him on the camper. Savage was to be held, even upon the pretext of a traffic charge, until the arrival of Cooke. As noted above, it is beyond peradventure that Sharpe, detained for forty minutes in the custody of Cooke and then the local police, was arrested prior to the existence of probable cause and formal arrest.

B. Contrary to Petitioner's contention, the Court of Appeals did not hold that absent probable cause, investigatory stops that are more than momentary

are *per se* unreasonable under the Fourth Amendment, without regard to the facts or circumstances that affect the duration of the detention.

Rather, the Court held that the lengthy detentions of Sharpe and Savage by law enforcement officers, who had no intention of allowing them to leave custody, closely resembled traditional arrests. Since these detentions were not grounded on probable cause, they were unconstitutional seizures. Review of the opinions below establish not a *per se* rule, but that the thirty to forty minute *"de facto"* arrest of Sharpe and the fifteen to twenty minutes *"de facto"* arrest of Savage, both without probable cause, transformed them into "traditional arrests", which require probable cause. (Pet. App. B; *Sharpe* v. *United States,* 660 F.2d 967, 970 (4th Cir. 1981)).

The Court of Appeals decision was based in part on the construction of this Court's opinion in *Dunaway* v. *New York,* 442 U.S. 200 (1979). There, this Court carefully analyzed the distinction between the seizure of a person for purposes of arrest, which requires probable cause, and the more limited seizure of a person by a brief investigatory stop, which requires merely reasonable suspicion. The Court rejected the suggestion of a multi-factor balancing test of "reasonable police conduct under the circumstances, which Petitioner urges upon the Court." *Dunaway* emphasized that the *Terry* stop was a narrow exception and was not to be extended so as to erode the long prevailing standards of probable cause:

> A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and

> individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balance" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway v. *New York*, 99 S.Ct. at 2257.

Additionally, the *Dunaway* Court stressed that a lesser standard than probable cause was not to be applied merely because the seizure occurred during an investigative stage rather than an accusatory stage. As the Court has previously held in *Davis* v. *Mississippi*, 394 U.S. 721, 726-27 (1969):

> [T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject a limited number of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions".

Thus, although the court below did not issue a *per se* rule concerning the length of any investigatory stop, it concluded that the detentions of Sharpe and Savage violated the "brevity" prong of this Court's cases concerning seizures based on less than

probable cause. Its conclusion was perfectly consistent with this Court's precedents. See *United States* v. *Cortez*, 449 U.S. 411 (1981) (the Fourth Amendment applies to seizures of the person, including *brief, investigatory stops* such as the stop of the vehicle here); *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873-878 (1975); *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968) (Emphasis supplied)

Recently, in *United States* v. *Place*, —— U.S. ——, 103 S.Ct. 2637 (1983), this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage *briefly*, and to investigate the circumstances that aroused suspicion, provided, that the investigative detention is properly limited in scope. Thus, the Court concluded in *Place* that the length of the detention of the respondent's luggage alone precluded the conclusion that the seizure was reasonable, in the absence of probable cause. The Court held that although reasonableness of seizures longer than the momentary ones in *Terry*, *Adams* v. *Williams*, 407 U.S. 143 (1972), and *Brignoni-Ponce* had been recognized, the brevity of the invasion of the individual's Fourth Amendment interest is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *United States* v. *Place*, *supra*, 103 S.Ct. at 2645.

Likewise, in *Florida* v. *Royer*, —— U.S. ——, 103 S.Ct. 1319 (1983), this Court held that *Terry* and

its progeny created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be investigative, yet violative of the Fourth Amendment absent probable cause. In the name of investigation, a person who is no more than suspected of criminal activity cannot be subjected to a full search of his person or of his automobile or other effects. "Nor may the police seek to verify their suspicions by means that approach the conditons of arrest." *Florida* v. *Royer, supra,* 103 S.Ct. at 1325.

Moreover, the *Royer* Court concluded that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id.*

This Court's prior analysis demonstrates that law enforcement officers making valid *Terry* stops lawfully may detain a subject for more than a brief moment, if such action is reasonably required in order to pursue a legitimate avenue of investigation. Here, however, Respondents were detained and not told of the reason of their detention. Sharpe was held in the custody of police officers for forty minutes, prior to being informed of the nature of the investigation and being placed under formal arrest. Savage was held for twenty minutes prior to his "formal" arrest. Before that, Savage had been held on the mere pretext of a traffic offense, and twice refused to consent to the search of the truck. After the second refusal, Agent Cooke unilaterally took the keys from

the ignition and proceeded to open the camper himself. Under the facts of this case, Sharpe's detention for thirty-five to forty minutes and Savage's detention for fifteen to twenty minutes were not reasonable under these circumstances.

In any event, it is clear that the Court below considered the totality of the circumstances which Petitioner urges. See *United States* v. *Cortez, supra,* at 417-418; *Florida* v. *Royer, supra.* The Court did not find the delay attributable to the evasive action taken by Savage, nor did the District Court. (J.A. 44-45) Rather, the lengthy detention was instead due to the officers' conduct: (1) the officers followed Respondents for over 21 miles before deciding to stop the vehicles; (2) the officers were unsuccessful in making radio communication once the vehicles were stopped; (3) it took the Myrtle Beach Police officers over 10 minutes to appear on the scene; (4) although several officers and agents were surrounding each vehicle, not one officer could tell the drivers why they were being detained; (5) there is nothing in the testimony that shows any "ploy" by Savage to evade officers; and (6) the lengthy delay was caused by Agent Cooke's failure to communicate with the several officers assisting him and by all the officers' failure to follow proper procedure.

C. Moreover, *Michigan* v. *Summers,* 452 U.S. 692 (1981), cited by Petitioner in support of its position, is inapposite to the instant case. Factually, *Summers* offers little guidance to this case, since it concerned detention of an occupant of the premises being searched pursuant to a search warrant. Significantly, the *Summers* Court compared the intrusion

upon Summers, as opposed to that intrusion which would obtain a formal arrest. "[O]f prime importance" was the fact that the police had obtained a warrant to search Summers' house for contraband. "A neutral and detached magistrate . . . had authorized a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701. Moreover, this Court noted that the type of detention imposed upon Summers was not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officer sought normally would be obtained through the search, and not through the detention.

Summers contrasts with the present facts. Respondent Sharpe was pulled over and detained without ever being informed of the nature of the detention or the reason for it. Likewise, Respondent Savage was detained by Officer Thrasher for fifteen to twenty minutes prior to the arrival of Agent Cooke. Upon his arrival, Cooke twice requested that he be allowed to search the camper and was refused both times. It was at that point that Cooke approached the rear of the truck to perform his bumper and olfactory investigations. Thus, the opposite from *Summers* occurred here; the officers used the detentions to gain information to justify the search, rather than the detention merely being incidental to a valid right to search.

In conclusion, *Michigan* v. *Summers* stands for the proposition that, for Fourth Amendment purposes, a search for contraband permitted by warrant and founded on probable cause implicitly carries with it limited authority to detain the occupants of

the premises while a proper search is conducted. 452 U.S. at 705. In fact, the Court rejected the "multi-factor balancing test of 'reasonable police conduct under the circumstances'" to cover all seizures that do not amount to technical arrests, which Petitioner urges upon the Court. The *Summers* Court cited from *Dunaway* v. *New York,* 442 U.S. 200, 213 (1979), where it was noted:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multi-various circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime."

Since the Court below carefully considered the facts of this case and correctly applied the facts to the current United States Supreme Court law, its decision should be affirmed.

II. The Marijuana Seized From the Pick-up Truck Properly Was Suppressed as a Fruit of the Unlawful Detention of Sharpe.

The court below was correct in its application of the exclusionary rule. Agent Cooke admitted that the stop of Sharpe and Savage was based on the appearance of the pick-up truck and was a profile stop. Thrasher testified that he knew in his mind that the truck they were following contained marijuana.

Once the stop was made, Sharpe was not questioned about the suspicions, but yet was not free to go on his way. He was placed in a police car; his license

had been seized and he was detained for approximately forty minutes. Thus, the court below correctly determined that this was a custodial arrest without probable cause. *See also, United States* v. *Thompson,* 712 F.2d 1356 (11th Cir. 1983).

If illegal detention for an extended period of time without prior probable cause is not deterred by application of the exclusionary rule, then police officers would be judicially licensed to illegally detain suspects, without probable cause, for extended periods of time, until the will of the suspects succumbs to the coercive effect of illegal police detention. Thus, all fruits of the illegal detention, including the Georgia driver's license in the name of Raymond J. Pavlovich (which is the only evidence which connects Sharpe to the Ford truck) and the marijuana, must be suppressed.

Brown v. *Illinois,* 422 U.S. 590 (1975), identified several factors that should be considered in determining whether a confession has been purged by the taint of the illegal arrest: (1) the temporal proximity of the arrest and the confession; (2) presence of intervening circumstances; and (3) particularly, the purpose and flagrancy of the official misconduct. 422 U.S. at 603, 604. See also *Taylor* v. *Alabama,* —— U.S. ——, 102 S.Ct. 2664, 2667 (1982). These factors equally are applicable to this illegal detention/illegal search fact sitution.

Temporally, Sharpe was detained unlawfully while Agent Cooke went about seeking to satisfy his suspicions about the contents of the truck. No intervening circumstances occurred except for the unlawful detention of Respondent Savage. Third, Respondents

were detained for an extended period so that the officers could get a look inside the camper shell of the truck. The delayed detention of Sharpe by Cooke, in tandem with the delayed detention of Savage by Thrasher prior to interrogation by Cooke, served no legitimate need except to increase the likelihood that over the course of time of the detention, the officers would get a look inside the truck. Had the stop of Savage been more than just a mere pretext to see what was in the camper (such as the traffic violation which Thrasher noted), these legitimate concerns could have been expeditiously carried out while Thrasher awaited Cooke's arrival. Instead, Savage was just held. Thus, the discovey of the marijuana, resulting as it did from the delayed detention of Sharpe and Savage, was directly and causally related to both prolonged detentions.

Accordingly, the Court of Appeals was correct in finding that the marijuana was subject to suppression as against Respondent Sharpe.

III. The Court Should Not Consider This Case, as Reversal Will Not Resolve the Litigation.

Reversal of the opinion of the Court of Appeals will not dispose of this case. Other meritorious issues were raised but not reached by the Fourth Circuit because of the reversal of the Respondents' convictions on other grounds. These additional issues include (1) whether the facts known to the police authorities at the time they stopped Respondents were tenuous and did not provide sufficiently articulable suspicion to justify a stop; and (2) whether the Court erred when it denied Respondents' motion to

dismiss the indictment due to the destruction of marijuana by the DEA in the absence of notification to defense counsel and in the absence of a court order. As to the second issue, the Court of Appeals went so far as to say:

> Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence—without defense counsel's knowledge and without leave from the District Court—nevertheless seriously concerns us. . . .

(Pet. App. B, 25A, n. 5)

Thus, unlike the Petitioner's contentions and *United States* v. *Villamonte-Marquez,* No. 81-1350 (June 17, 1983), reversal of the Court of Appeals decision would not necessarily reinstate the judgments of conviction and sentences entered by the District Court. At most, the Court could direct that the Court of Appeals opinion be reversed and that the matter be remanded to the Court of Appeals for further consideration of the unreached issues. Thus, this case is in a much different posture than *Villamonte-Marquez* when that case was before the Court. Because other preliminary issues exist, the Court should not proceed to decide the broad constitutional issues presently before it.

CONCLUSION

For all the above and foregoing reasons, the judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

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